UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRAT

The Secretary, United States Department of Housing and Urban Development, on behalf of Frank Jackovitz, Alex and Jessy Mathew, Charging Party, v. Ramapo Towers Owners Corporation and George Vernarchick, Respondents.	HUDALJ 02-94-0486-8 HUDALJ 02-95-0008-8 Decided: October 7, 1996

Michael J. Fingerit, Esquire
For the Respondent

Nicole K. Chappell, Esquire
For the Charging Party

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of complaints filed by Frank Jackovitz, and Alex and Jessy Mathew ("Complainants") alleging discrimination based on race and national origin in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). On April 9, 1996, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a consolidated charge against Ramapo Towers Owners Corporation and George Vernarchick ("Respondents") alleging that they had engaged in discriminatory housing practices in violation of 42 U.S.C. §§ 3604(a) and (b); 24 C.F.R. §§ 100.50(a), (b)(1)-(3); 100.60; 100.65(a),(b)(1); 100.70(b), (d)(3).

A hearing was held in Chestnut Ridge, New York, on August 13, 1996. At the conclusion of the Charging Party's case-in-chief, I granted Respondents' Motion for Judgment. At that time I stated that within sixty days following my receipt of the transcript, I would issue an Initial Decision and Order memorializing my reasons for granting Respondents' Motion. I received the hearing transcript on August 23, 1996.

Statement of Facts

1. Ramapo Towers Owners Corporation ("Ramapo Towers"), Spring Valley, New York, is a cooperative corporation, incorporated pursuant to the laws of the state of New York. George Vernarchick was president of the Ramapo Towers Board of Directors ("the Board") at least from February 1994 until April 1994. Respondents' Answer, ¶ 6.

2. In 1986 Frank Jackovitz purchased 356 shares in unit 4-H in the Ramapo Towers cooperative. Tr. 278.[1] He resided at unit 4-H until around 1993 when he placed the unit on the market for sale or rental. Tr. 278, 280.

3. Jessy and Alex Mathew, a married couple with two young children, were born, raised, and educated in India. Tr. 91-92, 111-12, 130-31. In 1994, the Mathews and their three-year old son[2] were living with Ms. Mathew's brother in Spring Valley, New York. Because Ms. Mathew's brother had recently married, the Mathews needed an apartment of their own. Tr. 92, 131; C.P. Exs. 1, 11. In February of 1994, they applied to rent Mr. Jackovitz's unit. Tr. 92, 94, 115, 136; C.P. Ex. 1.

4. Mr. Jackovitz and the Mathews had agreed to a two-year lease from May 1, 1994, through May 1, 1996, at $700 a month. Tr. 281, 291; C.P. Ex. 15. However, Complainants first needed to secure the approval of the Board. Tr. 339; C.P. Ex. 14.

5. As part of the approval process, the Board required that applicants submit various financial and other documentation. Tr. 144-45; C.P. Ex. 4. The letter requesting the information from applicants states that "[i]n order to process your application, your income must exceed. . . 4 times rent if two incomes. . . . In addition, the monthly rent plus debt payments cannot exceed 35% of income." C.P. Ex. 4; Secretary's Complaint ¶ 20; Respondents' Answer ¶ 19.

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[1]The following reference abbreviations are used in this decision: "Tr." followed by a number for the hearing transcript and page number and "C.P. Ex." for the Charging Party's exhibit.

[2]Their second child had not yet been born. Tr. 115.

6. At the time of their rental application, Ms. Mathew's monthly salary was $1509.30 ($348.30 weekly salary x 52 weeks = annual salary of $18,111.60; $18,111.60 / 12 months = $1509.30) and her husband Alex's monthly salary was $1,961.08 ($23,533 annual salary / 12 months = $1961.08). Tr. 104-05, 111, 144-45, 150-51; C.P. Exs. 3, 9.

7. Their monthly debts amounted to $352. Tr. 249-52, 258-59; C.P. Exs. 13-A, 13-B. In addition, they spent a *minimum* of $312.50 a month for child care expenses ($2.50 per hour x 30 hours a week = $75 a week; $75 a week x 50 weeks (allowing for two weeks vacation) = $3750; $3750 / 12 months = $312.50).[3] Tr. 111, 118-24, 229, 236-37, 260-61.

8. As part of the application process, the Board interviewed the Mathews on Tuesday, April 19, 1994. Tr. 187-89; Secretary's Complaint ¶ 24. During the interview, the Board members reviewed their application and financial information, discussed parking spaces, and informed Complainants that they would be notified on the following day concerning their application. Tr. 189-91. The Board also explained the cooperative's house rules, which consisted of four to five pages. Tr. 189-91, 217. While discussing use of the laundry room, one Board member commented that if Complainants were to cook they could not "have odor in the hallway." Tr. 189, 216-17.

9. After the interview, and thinking that the monthly rent should be 30% of his and his wife's income to qualify for tenancy, Mr. Mathew felt "positive" that the Board would approve their application. Tr. 218, 219-20.

10. The following day, Complainants were notified by their real estate agent that they had been rejected by the Board because they were not financially qualified. Tr. 192. After finding out about the rejection, Mr. Mathew computed his debt to income ratio without including child care costs, and determined that the Board should have approved his application. Tr. 222, 225.

11. The Mathews and Mr. Jackovitz filed complaints with HUD alleging discrimination based on race and national origin. Tr. 204; Respondents' Answer, ¶ 1.

Discussion

[3]The $312.50 figure was a minimum because the Mathews paid *as much as* $3.00 an hour for *at least* 30 hours of child care weekly. Tr. 118-20, 124.

The Charging Party alleges that Respondents violated sections 804 (a) and (b) of the Act which make it illegal, *inter alia*, to discriminate in the terms, conditions, or privileges of rental, on the basis of race or national origin. 42 U.S.C. §§ 3604(a) and (b). The Charging Party has the burden of proving, by a preponderance of the evidence, that Respondents discriminated against Complainants.

Absent direct evidence,[4] the Charging Party may fulfill its burden by indirect evidence. First, the Charging Party must establish a *prima facie* case of housing discrimination. *See HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.,* 907 F.2d 1447, 1451 (4th Cir.), *cert. denied,* 498 U.S. 983 (1990). Next the burden of production shifts to Respondents to articulate a nondiscriminatory reason for their actions. HUD may then prove that the asserted reason is pretextual. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *see also Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, pretext alone does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. *See St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993). Because the Charging Party failed to establish a *prima facie* case of discrimination, it was unable to prove that Respondents violated the Act.

Elements of a *prima facie* case "are not fixed;" they vary depending on the circumstances of each individual case. *Pinchback,* 689 F. Supp. 541, 549 (D.Md. 1988). Under the circumstances of this case, the Charging Party must prove the following to establish a *prima facie* case: (1) Complainants are members of a protected class; (2) the Mathews were financially qualified to rent Mr. Jackovitz's apartment; (3) they applied to rent the apartment; and (4) Respondents rejected the Mathews as tenants. *See, e.g., Soules v. HUD,* 967 F.2d 817, 822 (2d Cir. 1992); *Blackwell,* 908 F.2d at 870; *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979). By failing to establish the second element, the Charging Party did not carry its initial burden. Therefore, it is unable to prove that Respondents violated the Act.

To qualify financially, Complainants' monthly rent and debt payments could not exceed 35% of their income. At the time of their application, their total monthly income was $3,470.38 ($1509.30 + $1961.08). Thus, if the Mathews' debt exceeded $1,214.63 ($3470.38 x 35%), they were not financially qualified to rent Mr. Jackovitz's apartment. Because their monthly rent and debt payments totaled at least $1,364.50 ($352 in debt +

[4] *Black's Law Dictionary* defines direct evidence as evidence that "proves [the] existence of [the] fact in issue without inference or presumption." *Id.* at 413-14 (spec. 5th ed. 1979). The Board member's statement to the Mathews concerning "cooking odors" is subject to differing interpretations and, therefore, is not direct evidence of discrimination.

minimum child care costs of $312.50 + $700 rent), their debt exceeded by $150 per month the maximum permitted to deem them financially qualified for approval by the Board.

Conclusion and Order

The Charging Party has failed to prove by a preponderance of the evidence that Respondents engaged in discriminatory housing practices in violation of the Fair Housing Act. Accordingly, it is

ORDERED, that the charge of discrimination is *dismissed.*

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 104.910, and will become final upon expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

/s/

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WILLIAM C. CREGAR
Administrative Law Judge